THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

MATTER NO. IRC 165 OF 2020

In the dispute between:

GOMEZGA NKHWAZI………………………….………………………...APPLICANT

-AND-

FDH BANK LIMITED…………………………...……………….……..RESPONDENT

CORAM:	**TAMANDA C. NYIMBA**	: Acting Chairperson
	Steven Mponda	: Counsel for the Applicant
	Alex Bonongwe	: Counsel for the Respondent
	Rosemary Msimuko	: Court Clerk

ORDER ON ASSESSMENT

1 This is my order on the assessment of compensation for unfair dismissal, damages for unfair labour practices and the severance allowance payable to the applicant. This remedy assessment is conducted pursuant to a judgment on liability pronounced by this Court wherein it was determined that the applicant was not only unfairly dismissed but also subjected to unfair labour practices by the respondent.

2 The factual background undergirding the applicant's cause of action against the respondent is amply captured in the judgment on liability. For that reason, I do not consider it necessary to repeat the grounding facts in this order. Furthermore, for the sake of brevity, I shall only make reference to the parties' pertinent arguments and submissions in fitting places as I examine them in light of the law applicable to the assessment of these remedies. The parties should rest assured that, by taking this direction, their arguments and submissions lose none of their force.

3 I am indebted to Counsel on both sides of the divide for their assistance in guiding this Court through their well-crafted written submissions.

4 The first issue this Court must resolve pertains to the applicant's compensation for unfair dismissal. I begin by setting out the law that must guide this Court as it discharges this exercise.

5 Section 63 of the Employment Act (henceforth interchangeably referred to as "the Act" or "the Employment Act") holds the key. Section 63(1)(c) of the Act provides a statutory remedy of compensation which these Courts are mandated to award on a finding of unfair dismissal. Section 63(4) provides as follows:

> *"An award of compensation shall be such amount as the Court considers just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss can be attributable to the action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal".*

6 Section 64(5) of the Act enacts that the amount to be awarded under subsection (4) shall not be less than-

> *(a) One week's pay for each year of service for an employee who has served for not more than five years;*
>
> *(b) Two week's pay for each year of service for an employee who has served for more than five years but not more than ten years;*
>
> *(c) Three week's pay for each year of service for an employee who has served for more than ten years but not more than fifteen years; and*
>
> *(d) One month's pay for each year of service for an employee who has served for more than fifteen years.*

7 In ***National Bank of Malawi v. Benjamin Khoswe***[1]**,** the Court had this to say respecting operation of section 63 (4) of the Act in a passage occurring at p.14 of the judgment:

> *"It is a requirement of the said subsection that the amount of compensation should be just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal. It is therefore clear from this provision that the justice and equity of the compensation to be awarded is not to be measured from a*

[1] Civil Cause No. 718 of 2002 [Unreported].

vacuum. It instead ought to be measured first from a fountain of the level of blameworthiness of the employer in the occasioning of the unfair dismissal and then, if it exists, also from a fountain of blame the employee also bears for inviting the dismissal on himself".

8 Further in *Khoswe*[2], the learned Judge said the following on how sections 63(4) and 63(5) of the Act function:

"The Statute, as I understand it, tells Courts what to bear in mind as they compute compensation for unfair dismissal through Section 63(4) of the Employment Act. It then, in Section 63(5) provides a method of calculating what would be the minimum just and equitable compensation, and it ties this to period of service and fractions of monthly pay for each year of service of the dismissed employee. If, therefore, this is the method set by law, we are obliged to follow it even if methods of calculating this type of compensation elsewhere look more promising of getting a hefty reward".

9 Of further relevance are the instructive sentiments of the Court in ***Great Lakes Cotton Company Limited v. Mtawali and others***[3] where it was stated that the award must be reasonable in the circumstances and must not be construed as punishing the employer; that the figure must be one that puts the employee at some better position as to minimize his suffering and loss occasioned by the unfair termination.

10 For the purposes of determining the appropriate award of compensation in this matter, the parties have raised no controversy regarding the crucial essentialities of the applicant's total monthly remuneration and period of service. The applicant was in service for 1 complete year and his monthly salary was MK192,000.00.

11 In view of this undisputed remuneration and tenure, and pursuant to section 63(5) of the Act, the applicant prays for a discretionary award equivalent to 24 months' pay, translating to MK4,608,000.00. He argues that he legitimately expected to work until the retirement age of 60 and that the termination was entirely without fault on his part.

12 Conversely, the respondent argued that the applicant's compensation should be limited to the statutory minimum of one week's pay, translating to MK44,307.69. Relying on

[2] As above.
[3] [2011] MLR 76 (HC).

First Merchant Bank Limited v Eisenhower Mkaka and Others[4], the respondent resists any discretionary enhancement of the compensation, contending that future loss of earnings up to retirement do not matter. The respondent additionally asserts that the applicant failed to mitigate his losses.

13 I must quickly react to these arguments. First, by praying for a discretionary award equivalent to 24 months' pay, the applicant has evidently misconstrued the law in section 63(1)(c) of the Act. The applicant herein only worked for the respondent for a maximum period of 12 months and 8 days. This means that if this Court decides to grant a discretionary award by exercising its judicial discretion under section 63(4), the absolute maximum the applicant can be awarded is 12 months' pay, not 24.

14 In this connection, aside from the previously stated tripartite considerations in section 63(4), namely, (a) loss sustained by the employee; (b) employer's attributability; and (c) employee's contribution; Parliament, in its wisdom, clearly stipulated the manner of calculating minimum compensation in section 63(5) of the Act. This section sets out a graduated formula contingent on solely two variables, to wit, the employee's salary and the length of the employee's service ***up to the date of dismissal***. I must stress, with all the emphasis at my command, that the length of service is calculated only up to the date of dismissal and not beyond. As the Supreme Court of Appeal soundly put it in ***Terrastone Construction Ltd v. Solomon Chatuntha***[5]:

> *"Section 63 (5) of the Act directs the manner in which compensation should be determined.* ***<u>The amount of compensation would depend on the period the employee had worked before his dismissal.</u>****"* (Emphasis mine)

15 It is therefore undoubted that section 63(5) firmly ties the hands of any assessing Court. Consequently, it is an unbridled infraction of the Act to award an employee compensation for unfair termination covering a period beyond their total years of service. Admittedly, in cases involving fixed-term contracts, if the circumstances are compelling, nothing stops the assessing Court from awarding compensation for the unexpired term[6] which could conceivably exceed the employee's completed years of service.

16 Moving on, while I agree with the respondent that relying on expectations up to retirement age is outside the spirit of the Employment Act, it is an undeniable fact that

[4] Civil Appeal No. 1 of 2016.
[5] MSCA Civil Appeal Case No. 60 of 2011 [Unreported].
[6] See ***Wawanya v. Malawi Housing Corporation*** MSCA Civil Appeal No. 40 of 2007 [Unreported]. See also ***Emmanuel Matapa & Anor v. The Roads Authority*** IRC Matter No. 723 of 2021 (LL Registry) [Unreported].

the respondent's conduct in this matter was shockingly egregious. As I painstakingly detailed in my judgment on liability, the respondent drove a coach and horses through its own Ill Health and Injury Policy right at the threshold stage. The respondent forced a young, 32-year-old employee into early retirement on medically unsupported grounds when he was not incapacitated at all.

17 To award the applicant the bare minimum compensation of MK44,307.69 in these compelling circumstances would certainly amount to a gross miscarriage of justice and would be highly inequitable. Accordingly, this Court exercises its discretion under section 63(4) of the Act to exceed the statutory minimum. Considering the loss sustained by the abrupt curtailment of his career and the fact that the applicant bore zero fault while the respondent shouldered 100% blameworthiness, I award him 12 months' pay as just and equitable compensation for unfair dismissal translating to **K2,304,000.00**[7].

18 This is not the first time an unfairly dismissed applicant has, for cogent reasons, been awarded 12 month's pay for each year served as is granted in this action. To bear this out, I cite several cases where the award was similarly calibrated to 12 months' pay for each year served.

19 In ***Eleanor Harawa Chimbe v. Continental Discount House Ltd***[8], this Court on 6 September 2024 awarded the applicant 12 months' pay for each year served. The applicant in that case, who was dismissed for no fault of her own, had worked for the respondent for 3 years.

20 In ***Adness Nyaka v. Toyota Malawi Ltd***[9], the Court citing with approval the position taken by Twea J. in ***DHL International v. Aubrey Nkhata***[10] and taking into consideration the high-handed manner in which the applicant's employment was terminated by the respondent as well as the humiliation that she was subjected to, awarded the applicant 12 months' pay for each year of service.

21 In ***Timothy Sukali v. LaFarge Cement Company Ltd***[11], the Court awarded 12 months' pay for each year of service where the applicant was dismissed in circumstances that brought anguish, hardship and loss of potential to secure alternative employment.

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[7] MK192,000.00 × 12 × 1 = MK2,304,000.00
[8] IRC Matter No 343 of 2009.
[9] IRC Matter No 988 of 2022.
[10] Civ App No 50 of 2004 (Unreported).
[11] IRC Matter No. 90 of 2010.

22 Significantly, the Supreme Court of Appeal in ***Wawanya v. Malawi Housing Corporation*** [12] instructively stated, at page 8, that:

> *"Section 63 (5) then sets out the minimum the Court shall award. Our reading of section 63 (4) is that a court has considerable latitude in awarding compensation under the Employment Act. In the end it really should not make any difference whether one wants to call the award an award under section 63 of the Employment Act or a common law award or any other description as one may please. The provision allows for what the Court would consider just and equitable in the circumstances of the case. If the Court was minded, and the circumstances were compelling, there is nothing to stop it from awarding compensation for the unexpired term of a fixed term contract or indeed a shorter period".*

23 Now, learned Counsel for the applicant advanced a further submission that the award for unfair dismissal should be additionally uplifted by 90 per cent to cater for the devaluation of the local currency and attendant inflation since the applicant's dismissal in October 2019.

24 The subject of elevating or boosting awards in unfair dismissal cases is highly notorious. This Court's views on this topic were recently articulated in ***Davie Misinkhu v. Rab Processors Limited***[13] in the following terms:

> *"[.....] this Court cannot help to register its frustration (for want of a better word) with the decisions coming from the High Court. It is regrettable that the High Court seem not to be speaking with one voice as decisions of individual Judges on the subject of boosting of awards are somewhat irreconcilable. For instance, the High Court in* **Standard Bank PLC v. Kalumo and 3 Others**[14] *as well as in the* **Finca Malawi**[15] *case outrightly proscribed amplification of awards. On the other hand, the High Court in* **Vanguard Life Assurance Limited v. Enock Jones Kamphonje**[16] *stated that boosting of awards is permissible in exceptional circumstances.*
>
> *Quite frankly, this state of affairs generates tremendous confusion to a Court in my position as, pursuant to the doctrine of precedent, I must defer to these*

[12] MSCA Civil Appeal No. 40 of 2007.
[13] IRC Matter No.338 of 2013.
[14] (Civil Appeal Case No. 18 of 2024) (HC, PR) [Unreported].
[15] Civil Appeal Case Number 13 of 2024 (Being IRC Matter No. 16 of 2019) [Unreported].
[16] Miscelleneous Civil Case No. 64 of 2024 (Being Matter Number IRC ZA 01 of 2024) [Unreported].

rather conflicting High Court decisions. Moreover, the inconsistent High Court decisions engender enormous uncertainty to parties who litigate their cases in this Court."

25 Notwithstanding my lamentations in *Davie Misinkhu*[17], the High Court in *Vanguard Life Assurance Ltd*[18] additionally held that if an award is already way above the minimum prescribed under section 63(5) of the Employment Act, it is not in order to further enhance that award. Therefore, even though the authorities are not definitively clear on whether boosting is entirely proscribed, the award for unfair dismissal in the present case cannot be uplifted because it already rests far above the statutory minimum.

26 I now shift attention to the assessment of the applicant's damages for unfair labour practices. It should be recollected that this Court held the applicant is entitled to compensation under this head because the respondent's conduct contravened section 31(1) of the Constitution of the Republic of Malawi.

27 Section 31(1) of the Constitution provides that every person shall have the right to fair and safe labour practices and to fair remuneration. This is a constitutional right. It obviously does not enure to a person via the Labour Relations Act or the Employment Act as it does not appear anywhere in those two pieces of legislation. What is provided for under the Employment Act is unfair dismissal with the available remedies being reinstatement, re-engagement and compensation.

28 Unfair labour practice and unfair dismissal are two distinct causes of action. The former is founded on a constitutional provision while the latter is founded on the Employment Act. The question then is: how does a Court assess compensation for the violation of a person's constitutional right? Section 46(2)(a) of the Constitution is highly instructive, providing:

> *"Any person who claims that a right or freedom guaranteed by this constitution has been infringed or threatened shall be entitled:*
>
> *To make application to a competent court to enforce or protect such a right or freedom."*

29 Further, section 46(4) empowers the Court to award compensation in the following terms:

[17] As above n.13.
[18] As above n.16.

"A court referred to in subsection 2(a) shall have the power to award compensation to any person whose rights or freedoms have been unlawfully denied or violated where it considers it to be appropriate in the circumstances of a particular case."

30 The High Court in ***Nicholas Treva Malunga v. Attorney General***[19] reiterated the notion that a person whose constitutional rights have been infringed must receive a remedy. The Court said:

"In this case the plaintiff seeks a specific public law, constitutional remedy of damages, separate and distinct from any common law remedy that he may be entitled to. In essence the competency or otherwise of the relief sought by the plaintiff turns on a proper construction of **section 46 (2) (a)** *of the Constitution."*

31 Notably, the Constitution does not prescribe a mathematical formula for calculating compensation for violations of its provisions. However, the Court in ***Kachinjika v. Portland Cement Company***[20] provided valuable guidance in a passage occurring at page 181 of the report:

"We, much like the Court in the Nkhwazi and Magola cases, are of the view that in so far as the Constitution never gave much guidance in respect of levels of compensation beyond effective remedy such compensation should be what the court seized of the matter thinks just and equitable in that particular case guided, if need be, by jurisprudence from beyond our borders."

32 Looking beyond our borders, the United Kingdom Supreme Court has held that assessing compensation for constitutional violations aims to uphold the minimum standard of human rights. In ***Commissioner of Police of the Metropolis v. DSD and Another***[21], the Court stated:

"It is a well settled principle that the award of compensation for the breach of a convention right is different from an award for civil damages. The compensation for the breach of a convention right is to uphold the minimum standard of human rights, whereas in a civil action it is to compensate the individual for loss."

[19] Civil Cause No. 85 of 2018 [Unreported].
[20] [2008] MLLR 161.
[21] [2018] UKSC 11 (21 February 2018).

33 In the South African case of ***Fose v. Minister of Safety and Security***[22], Ackerman J. noted at para 69:

> *"I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the Constitution cannot properly be upheld or enhanced."*

34 The African Commission on Human and People's Rights in ***Open Society Initiative v. Cote d'Ivoire***[23] illuminatingly expressed itself as follows:

> *"…the main aim of redress of human rights violation is founded on the restitution intergrum principle, which requires that the victim is reinstated in the situation prior to the violation. Where it is impossible to reinstate him, any violation will be resolved through compensation. The compensation should be fair, adequate, effective, sufficient, appropriate and proportionate to the prejudice suffered."*

35 The Botswana Court of Appeal equally weighed in on the topic in ***Oatile v. The Attorney General***[24] where Justice Dingake stated at para 19:

> *"An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches."*

36 Furthermore, going by sections 46(2)(a) and 46(4) of the Constitution, it is unequivocally clear that compensation for constitutional violations is discretionary and must be determined based on the specific circumstances of each case. Regarding the discretionary element, and though inherently a labour law case, Sir John Donaldson stated in ***Norton Tool Co. Ltd v. Tewson***[25]:

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[22] 1997 (7) BCLR 851.
[23] 318/06.
[24] 2011 2 BLR 209 CA.
[25] [1973] WLR 45.

"The amount has a discretionary element and is not to be assessed by adopting the approach of conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle."

37 It is similarly a settled principle of law that when awarding damages, the Court is compelled to consider awards of a similar nature[26]. Accordingly, I now set out a few cases I shall bear in mind when exercising the discretion in arriving at appropriate damages for the applicant herein following the respondent's breach of section 31(1) of the Constitution.

38 In ***The State v. Inspector General of Police & 2 Ors Ex-parte MM & 18 Ors***[27] the Court was moved to assess damages for violations of constitutional rights and it awarded up to MK10,000,000.00 damages. The awards were made on 9 March 2021.

39 In ***Patrick Mumba v. Opportunity International Bank of Malawi***[28], the defendant violated the claimant's right to privacy by wrongfully advertising his house for sale and forcibly allowing potential buyers to get into the house and inspect it including the bedrooms. The High Court awarded the claimant the sum of MK5,000,000.00 under this head on 17 November 2023.

40 In ***Brian Banda v. Attorney General (State Residences)***[29], the Industrial Relations Court awarded the applicant the sum of MK5,000,000.00 as damages for unfair labour practices. The award was made on 22 December 2023.

41 In ***Gabriel Kamanga & Others v. Council of the Malawi University of Business and Applied Sciences***[30], the Industrial Relations Court awarded each of the 14 applicants the sum of K5,000,000.00 as damages for unfair labour practices. The award was made on 22 October 2024.

42 In ***Alex Malikebu & 3281 Ors v ADMARC Limited***[31], the applicants were awarded each a sum of MK5,500,000.00 as damages for unfair labour practices. The award was made on 15 November 2024.

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[26] ***Malamulo Hospital (The Registered Trustees) v. Mangani*** [1996] MLR 486.
[27] Judicial Review Cause No 7 of 2020 [Unreported].
[28] Civil Cause Number 49 of 2016 [Unreported].
[29] Matter No. IRC 1001 of 2022 [Unreported].
[30] IRC Matter No. 1036 of 2022 [Unreported].
[31] Matter No. IRC 554 of 2023 [Unreported].

43 Returning to the facts of the instant case, learned Counsel for the applicant submitted that bearing in mind the glaring unfair labour practices the applicant was subjected to, damages in the sum of MK11,000,000.00 would be adequate. The respondent, conversely, submitted that an award of MK1,500,000.00 would suffice.

44 It must be highlighted that the award this Court ultimately makes under this head is pre-eminently discretionary and I remind myself that I must exercise this discretion judiciously. This Court is not bound by the parties' proposed figures and is at liberty to scale them up or down to reflect the idiosyncratic circumstances of the case at hand. I shall also consider the value of the currency and the inflation that has occurred since the comparable awards were made, as is the norm in assessments of this kind (which are treated differently from the statutory determination of compensation for unfair dismissal).

45 The circumstances under which the respondent herein perpetrated unfair labour practices on the applicant in this case amply appear in this Court's judgment on the liability issue pronounced on 25 April 2025. Nevertheless, it will do a world of good to rehearse the said circumstances here, if only to properly contextualize the final award under the unfair labour practices head.

46 Briefly, this Court found that the respondent engaged in a series of egregious unfair labour practices following the applicant's diagnosis of *de Quervain's Tenosynovitis*. On 15 August 2019, an orthopaedic surgeon prescribed the applicant a 14-day recuperative leave. Although this medically mandated break was calculated to last until at least 30 August 2019, the respondent prematurely summoned the applicant to an irregular investigation meeting on 28 August 2019. This Court explicitly determined that such an arbitrary interruption of medically sanctioned leave was unreasonable, unacceptable and directly contrary to good industrial and labour relations.

47 Furthermore, in stark dereliction of its own Ill Health and Injury Policy, the respondent circumvented any formal capacity investigation and summarily reassigned the applicant to the position of Enquiries Clerk. Remarkably, the respondent unilaterally deemed the applicant's condition to be severe, yet explicitly conceded in writing that this new clerical assignment "was equally against the prescription from the doctor". For an employer to compel an employee to labour for nearly two months in a role it consciously acknowledged was imperiling his health and aggravating his injury constitutes a profound and manifest unfair labour practice.

48 Ultimately, the respondent terminated the applicant's employment on the pretext of ill health, entirely abandoning the procedural safeguards enshrined in its own policy. The respondent neglected to conduct any substantive and valid inquiry into the actual pathology of the applicant's condition. In doing so, it willfully ignored that the disease was distinctly temporary, that clinical symptoms typically resolve within four to six weeks and that the applicant had been effectively discharging his newly assigned duties without complaint. The decision to impose medical retirement upon a 32-year-old employee under these circumstances was entirely devoid of legal, medical or factual justification.

49 Finally, this Court found that the respondent railroaded the applicant into choosing between the lesser of two evils, namely, resigning or being retired on medical grounds. During a meeting on 18 October 2019, the respondent gave the applicant until 21 October 2019 to make a decision. When the applicant reached out on 21 October to state that he enjoyed his work and wished to remain employed, the respondent handed him a retirement letter that had already been dated 18 October 2019. This backdated letter demonstrated that the respondent had finalized its decision regardless of the applicant's input giving this Court the distinct impression that the respondent simply wanted him gone immediately.

50 Therefore, taking into account all these extraordinarily and egregiously bad circumstances, and informed by the awards in the comparable cases cited earlier, this Court exercises its discretion to award the applicant the sum of **MK12,000,000.00** as damages for unfair labour practices.

51 Penultimately, I turn to the determination of the applicant's award for severance pay.

52 Under section 35(1) of the Employment Act as read with Part 1 of the First Schedule, the applicant is entitled to the payment of two weeks' wages for his one completed year of service. It is evident that the applicant made an error in his calculations, arriving at a figure of MK96,000.00. In contrast, the respondent correctly computed the severance pay by applying the strict statutory formula, which yields MK88,615.38[32]. Accordingly, I award the applicant the sum of **MK88,615.38** as a severance allowance.

[32] Calculated as follows: Basic salary (K192,000) x 12 months divide by 52 weeks = weekly wage (K44,307.69). Then weekly wage (K44,307.69) x number of weeks (2 weeks since the applicant's length of service is not less than one year, but not exceeding five years) x number of years (1 year) = **K88,615.38**.

53 Finally, I must give effect to the order I made in the judgment on liability concerning the respondent's counterclaim. I ordered that the applicant's outstanding staff loan balance of MK268,046.50, with interest frozen as of 18 October 2019, be offset against his final assessment package. MK268,046.50 shall, therefore, be deducted from the total award.

54 To sum up, and lest there be any confusion, the final assessment of the applicant's remedies is as follows:

(a) Compensation for unfair dismissal: MK2,304,000.00
(b) Severance allowance: MK88,615.38
(c) Damages for unfair labour practices: MK12,000,000.00

Sub-Total: MK14,392,615.38
Less Loan Set-Off: (MK268,046.50)
Net Total Payable to the applicant: **MK14,124,568.88.**

55 I order the respondent to pay the applicant the net total sum of **MK14,124,568.88** within 7 days from the date of this Order.

56 I am a mere Court of first instance. As such, a party wronged by the outcome in this matter, it being final in this Court, may exercise their right of appeal to the High Court in keeping with the dictates of section 65 (2) of the Labour Relations Act.

57 It is so ordered.

Pronounced this 3rd day of August 2026 at IRC, **PRINCIPAL REGISTRY**

Tamanda Chris Nyimba
ACTING CHAIRPERSON